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Supreme Court, U.S.
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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

ARTHUR G. MUEGLER, JR.,
Petitioner,

VS.

ALFRED W. HARRE and DAVID BENING,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the district court's total preclusion of trial testimony from Petitioner, a defendant in this civil fraud case, as a sanction because Petitioner asserted his Fifth Amendment Right against self-incrimination and refused to answer discovery deposition questions more than three years prior to trial and almost two years after formal waiver of the Privilege, without a showing of prejudice to Respondents, was a too costly penalty that violated Petitioner's Fifth Amendment Right against self-incrimination, Fifth Amendment Right to due process of law, Seventh Amendment Right to a fair trial by jury or Eighth Amendment Right against imposition of excessive fines and punishment ?

2. Whether the district court's total preclusion of all of Petitioner's evidence (i.e. testimony of witnesses and documents) and preclusion of effective cross-examination of Respondents witnesses at trial, as a sanction because either (a) Petitioner asserted his Fifth Amendment Right against self-incrimination and refused to answer discovery deposition questions or (b) as a Federal Rules of Civil Procedure Rule 37 sanction, without a showing of prejudice to Respondents, was a too costly penalty that violated Petitioner's Fifth Amendment Right against self-incrimination, Fifth Amendment Right to due process of law, Seventh Amendment Right to a fair trial by jury or Eighth Amendment Right against excessive fines and punishment ?

3. Whether Petitioner's Fifth Amendment Right against self-incrimination, Fifth Amendment Right to due process of law or Seventh Amendment Right to a fair trial by jury was violated by the district court's denial of Petitioner's motion to exclude comments from Respondent's legal counsel in Closing Argument, and Respondent's subsequent Closing Argument statements, that Petitioner's assertion of his Fifth Amendment Right against self-incrimination in a discovery deposition was evidence that Petitioner was guilty of defrauding Respondents ?

LIST OF ALL PARTIES BELOW

The caption of the case in this Court contains the names of all parties to the proceedings of The United States Court of Appeals For The Eighth Circuit sought to be reviewed in this proceeding. No party is a corporation.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Arthur G. Muegler, Jr. respectfully prays a Writ of Certiorari issue to review the May 23, 1997 judgment of The United States Court of Appeals For The Eighth Circuit entered in this proceeding (Appendix, infra A-1)("Eighth Circuit Judgment").

JUDGMENT BELOW

The Eighth Circuit Judgment sought to be reviewed by Writ of Certiorari is reported at 113 F.3rd 909 (8th Cir. 1997). The rulings and judgment (Appendix, infra A-7, A-9) in this case by The United States District Court, Eastern District of Missouri, Eastern Division, are not reported.

JURISDICTIONAL STATEMENT

The Eighth Circuit Judgment was entered on May 23, 1997 (Appendix, infra A-1). On June 6, 1997, Petitioner timely filed a Petition For Rehearing En Banc under Eighth Circuit Rule 35A(b) and Federal Rules of Appellate Procedure Rule 35 (b). The Petition For Rehearing En Banc was treated under Eighth Circuit Rule 35A(c)(4) to include a petition for rehearing by the panel that decided the case. Rehearing en banc and rehearing by the panel of judges who decided the case were denied July 9, 1997 (Appendix, infra A-6). This petition is filed within ninety (90) days of that date.

The jurisdiction of this Court is invoked in this proceeding under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED IN CASE

This case involves important issues respecting the following provisions of The United States Constitution :

Amendment V. "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment VII. "In suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of common law."

Amendment VIII. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

STATEMENT OF CASE

I.

Federal Court Jurisdiction Below

On September 21, 1990, Respondents filed a civil suit for damages against Petitioner Muegler and others in the United States District Court, Eastern District of Missouri, Eastern Division, on common law fraud and negligence theories (App:6). The amount in dispute exceeded $50,000.00 exclusive of interest and costs. Federal jurisdiction was premised upon complete diversity of citizenship between parties plaintiff and parties defendant under 28 U.S.C. §1332(a)(1).

The case went to trial in June, 1994 ("Trial #1") and the jury returned verdicts in favor of Petitioner Muegler ("Muegler") on all counts although Muegler was barred by the trial court from testifying or offering any evidence at trial (App:11, 15). Judgment was entered in accordance with the jury verdicts. Respondents took an appeal to The United States Court of Appeals For The Eighth Circuit (App:16). The Eighth Circuit reversed and remanded the case on instructional err. *Bening et ano v. Muegler*, 67 F.3rd 691 (8th Cir. 1995).

Upon retrial ("Trial #2"), on January 23, 1996 the jury returned verdicts in favor of Respondent Bening and against Muegler in the sum of $130,000.00 actual damages plus $130,000 punitive damages and in favor of Respondent Harre and against Muegler in the sum of $130,000.00 actual damages plus $130,000 punitive damages. The trial court entered judgment in accordance with the jury verdicts (Appendix, infra A-7, A-9). Muegler filed a timely post trial Renewed Motion For Judgment As A Matter of Law (App:106) and Motion For New Trial, Or, Alternatively To Alter Or Amend Judgment (App:130) which were denied May 23, 1996 (App:25). On May 30, 1996, Muegler filed a timely Notice of Appeal to The United States Court of Appeals For The Eighth Circuit (App:28). Appellate court jurisdiction was invoked under 28 U.S.C. §1291, 28 U.S.C. §2106 and 28 U.S.C. §2107.

On May 23, 1997 the Eighth Circuit affirmed the trial court judgment ("Eighth Circuit Judgment"). *Harre et al v. Muegler*, 113 F.3rd. 909 (8th Cir. 1997). On June 6, 1997, Petitioner timely filed a Petition For Rehearing En Banc under Eighth Circuit Rule 35A(b) and Federal Rules of Appellate Procedure Rule 35 (b). The Petition For Rehearing En Banc was treated under Eighth Circuit Rule 35A(c)(4) to include a petition for rehearing by the panel that decided the case. Rehearing en banc and rehearing by the panel of judges who decided the case were denied July 9, 1997 (Appendix, infra A-6). This petition for writ of certiorari

to review the May 23, 1997 judgment of The Eighth Circuit is filed within ninety (90) days from July 9, 1997.

II.

Summary of Material Facts

Concepts Communication Management Corp. ("Concepts") was organized as a Missouri corporation on August 7, 1987 (App:613). It engaged in the paging, telephone answering and cellular telephone business in the Metro St. Louis, Missouri, Area (T1:87). Concepts initial funding came from investors in the form of investment in limited partnership interests in Concepts Tele Communications L.P. I and L.P. II ("Partnership")(T1:90). Respondents, in April-May 1988, invested in Partnership (T1:81).

At some point prior to September 2, 1988, Petitioner Muegler, a licensed and practicing attorney at law, was retained by Concepts to restructure the Concepts group of companies to correct an organizational deficiency created by a previous Concepts lawyer. At the time, Concepts investors held a limited partnership interest in a non-operating shell having no assets (Sic: Partnership) while the assets and operations of the Concepts companies were conducted within the Concepts corporate structure. Therefore, unless restructured, the "investors" had no equity interest in any organization conducting Concepts business (T3:71; T2:229-230).

The reorganization plan which evolved had the following features : (a) Concepts made a stock offering to existing Partnership investors whereby the investor assigned his Partnership interest to Concepts in return for Concepts stock, (b) the offered Concepts stock maintained the proportionate equity status of each investor as contemplated at the time of the original Partnership investment, (c) any investor who wished to get out of his Partnership investment could opt out and he would be repaid his

original investment sum plus accrued interest, (d) the lapsed Partnership interests resulting from investor cash outs were proportionately offered to investors electing to stay in so they could increase their percentage of ownership of Concepts stock and (e) additional Concepts stock was offered to raise working capital (T3:71). Petitioner, as Concepts attorney, prepared the legal portion of the prospectus to definitize the plan. Certified public accountants Mssrs. Mueller, Prost, Purk & Willbrand compiled the financial statements contained in the prospectus (App:621; T3:65).

Respondents elected to "stay-in" and get Concepts stock. All of Respondents Concepts stock investments, totaling $44,600.00 in the aggregate (T1:81-82; T2:198), were made pursuant to the terms of the Concepts prospectus (T3:78).

Concepts wanted to expand its business into the Springfield, Illinois area. A potential investor dropped out, so on March 11, 1989 Respondents went to Concepts offices to buy a limited partnership interest in Concept's proposed Springfield business (T3:88). Petitioner Muegler appeared as Concepts legal counsel. James Grice, Concepts' president, was also present. Muegler advised Respondents he was representing the interest of Concepts, not them, in this proposed transaction and that they could leave and take the proposed Springfield joint venture contract documents with them to obtain legal advice from counsel of their choice before continuing discussions (T3:89-90). Nonetheless, Respondents said they wished to proceed without the assistance of counsel (T3:91). Respondents read and understood the terms of the joint venture contract documents (T3:90). Respondents then signed the documents and each delivered a $60,000.00 contribution check payable to Concepts for their respective limited partnership interest in the proposed venture (Plaintiff's Exhibit 2-7; Plaintiff's Exhibit 1-4). The other proposed limited partner, James Grice, never signed the joint venture documents or contributed his $30,000.00 investment sum (T3:96). Con-

cepts was to be the sole general partner. Grice did not supply Petitioner Muegler with the identity of an Illinois registered agent or Illinois registered office needed to complete organization of the Illinois joint venture limited partnership entity (T3:97). The Illinois joint venture limited partnership was never formed. Concepts collected the $60,000.00 checks and bought a $120,000.00 certificate of deposit (T3:27; T3:40) ... Concepts then pledged the $120,00.00 certificate of deposit as collateral for a Citizens Bank $120,00.00 working capital loan to Concepts (T3:41).

Respondents contended, and the jury verdict was premised upon the proposition, that Petitioner Muegler was responsible for the alleged false representations of his client Concepts in the prospectus and in the Springfield joint venture contracts because Muegler was the Concepts lawyer who prepared the prospectus and Springfield joint venture contracts (T2:143-144; T3:79-80; T2:99; T2:103). Petitioner Muegler was never a Concepts shareholder, officer, director or employee. In all transactions Respondents knew Petitioner functioned exclusively as attorney for Concepts (T3:62).

Petitioner's legal representation of Concepts commenced to fade out in the Summer-Fall 1989 when Petitioner took up full time residence in Arizona. Other lawyers took over (T3:89).

Pursuant to search warrant, law enforcement official raided Concepts facility on December 29, 1989 in an attempt to seize evidence of alleged state law securities fraud by Concepts and James Grice prior to September 2, 1988 (T2:213). The raid "shut the business down" (T2:168). Immediately after the raid Gary Fears, a creditor, announced he was taking over Concepts business (T2:217). Fears changed Concepts name to "Page Midwest" (T2:217).

In early January, 1990, Petitioner Muegler met with Fears and Respondents at Concepts former offices (T3:217). At this

meeting Muegler informed Fears that Respondents had a joint venture contract with Concepts for the Springfield, Illinois area and Muegler expected Fears to honor the contract (T3:127-128). Respondents testified Muegler was trying to "take care of Concepts Communication people" (T3:127). Fears did not cooperate ... he closed Respondents and other Concepts shareholders out of the business thereby making their Concepts investments worthless (T3:133).

James Grice, Concepts President, was a convicted felon who served time in Texas before incorporating Concepts (Plaintiffs Exhibit 59). There was no evidence suggesting or showing Petitioner Muegler had knowledge of this conviction prior to December 29, 1989.

In February, 1992, Muegler was indicted by a Washington County, Illinois, Grand Jury (the small, agricultural rural county in which Respondents resided) for alleged Illinois state securities law violations in connection with Respondents investments in the Concepts Springfield, Illinois, joint venture (App:503, 539). Although dismissed once and reversed and remanded on appeal, these felony charges were pending against Muegler throughout the period February, 1992 - January 23, 1996 (the charges were finally dismissed, with prejudice, September 22, 1997).

Muegler asserted his Fifth Amendment Privilege Right against self-incrimination and refused to answer questions presented to him at a June 3, 1992 discovery deposition (App:584). The scope of the deposition was very general (i.e. Muegler's personal information, did Muegler know Grice, did Muegler ever attend a Concepts public meeting, did Muegler make any statements respecting Concepts to Respondents, did Muegler know whether Concepts funds were used to establish a bar and did Muegler review the Concepts September 2, 1988 Prospectus financial statements)(Exhibit 83, App:584). Muegler was not asked to identify witnesses or relevant documents. Id. On April 5, 1994

Muegler waived Fifth Amendment protection by filing a formal Notice Of Waiver of Fifth Amendment Rights (App:316; Docket #42).

On April 5, 1994 the district court granted (App:549) Respondents motion (App:327) totally precluding Petitioner from testifying at Trial #1 as a sanction for asserting his Fifth Amendment Right against self-incrimination and refusing to answer questions during the June 3, 1992 deposition. The district court also totally precluded Petitioner from offering any witness testimony, documentary evidence or other evidence at Trial #1 as a sanction either (a) for taking the Fifth Amendment at deposition or (b) under Federal Rules of Civil Procedure Rule 37. Id.

Trial #1 (June, 1994) resulted in jury verdicts for Muegler which were reversed on appeal on instructional error. *Bening et al v. Muegler,* 67 F.3rd 691 (8th Cir. 1995). Immediately after receiving the mandate the district court entered an order November 3, 1995 (a) cutting off all discovery and (b) setting the case for retrial on January 4, 1996 (App:314 Docket #91). Muegler timely moved the district court to amend its order to set trial in May, 1996 to allow Respondents reasonable opportunity to depose Muegler or otherwise engage in discovery (App:311 Docket #94). Muegler also filed a Second Notice of Waiver of Fifth Amendment Rights on December 20, 1995 and moved for an order confirming "waiver" (App:305 Docket #123). The district court, exacerbating the alleged discovery problem resulting from Muegler's June 3, 1992 deposition, denied Muegler's motion to reset the trial date, denied Muegler's request to open discovery for a reasonable period of time to allow Respondents to depose Muegler and denied Muegler's request to confirm waiver of his Fifth Amendment Privilege (App:305 Docket #123). The district court forced the case out to trial in January, 1996 without taking advantage of the presented opportunity to fashion a remedy which would not have made Muegler's June 3, 1992 assertion of his Fifth Amendment Right against self-incrimination unconstitutionally too costly.

The district court thereafter sustained Respondents Motion To Strike (App: 20; App:318 Docket #121) which completely barred Muegler from testifying on any subject (even subjects not addressed in the June 3, 1992 deposition) at Trial #2 without even an allegation that Muegler's testimony would surprise or be unduly prejudicial to Respondents. The absence of "surprise" or "prejudice" to Respondents if Muegler was allowed to testify at trial, was shown in Respondents March, 1994 and December, 1995 Pre-Trial submissions wherein Muegler was identified as a person who may be called by Respondents to testify in Respondents Case-In-Chief at trial (App:408,453).

The district court stated its ground for this total preclusion was "You are thwarting the discovery process by failing to take — to give your deposition ... You are not abiding by the discovery process" (T1:7), "So if you don't want to show your hand, then sometimes you will not be allowed to play that hand" (T1:7), "You want to announce you are available, you weren't available when you had the opportunity" (T2:58) and Muegler was denied opportunity to testify at trial because Muegler "took the Fifth Amendment in the June 3, 1992 deposition in this case" (T4:7). Muegler also was denied opportunity to make an offer of proof at trial (Reply Brief, Addendum 1 Transcript 6/15/94, pages 538-542).

During Trial #2 Muegler filed a Motion To Exclude Subject Matter From Closing Argument (T4:9; App:235 Docket #141) seeking to prevent Respondents from contending in Closing Argument that Muegler was guilty because he took the Fifth Amendment at a deposition and did not offer evidence at trial. The district court denied the motion (T4:9). Respondents legal counsel took full prejudicial advantage of this opportunity to improperly argue in closing argument :

- "Then, why did he (Sic: Muegler) take the 5th Amendment in his deposition ? He refused to answer the question. The 5th Amendment says I don't want to

testify because I'll incriminate myself and get arrested. That's what the 5th — what does taking the 5th Amendment tell you ? One, he has got something to hide; and, two, he is afraid of being arrested just like Grice; and, three what kind of gall does he have to stand before you and tell you we don't have enough evidence to prove our case if he doesn't have the courage to sit down in a deposition and answer the questions truthfully ?" (T4:30)

- And, after reminding the jury Muegler took the Fifth Amendment and Concepts president Grice was "hauled away in handcuffs" after the "Feds had kicked down the door" (T4:23), Respondents' legal counsel argued "He (Sic: Muegler) didn't want the Feds knocking on his door. Why do you think he went to Arizona ? He's running from the law." (T4:23). There was no evidence to support these outrageous accusations.

During Trial #2 (January, 1996) the district court also (a) precluded eight persons called by Muegler to testify in his Case-In-Chief from being sworn in or testifying at trial (T4:7-8) and (b) precluded Muegler from identifying, offering into evidence and receiving in evidence fifty-one (51) documents in Muegler's Case-In-Chief (T4:7-8) either (i) as a sanction because Muegler asserted his Fifth Amendment Privilege against self-incrimination in the June 3, 1992 discovery deposition or (ii) as a Federal Rule of Civil Procedure Rule 37 sanction for failure to timely disclose information required to be disclosed under Federal Rule of Civil Procedure Rule 26(a) (T4:4-8). Each witness Muegler called to testify was disclosed by Muegler (App:389,434) and Respondents (App:408,453) in their respective March, 1994 and December, 1995 Pre-Trial Submissions. The trial court's preclusion order was premised upon Respondents Motion To Strike (App: 20; App:318) ... Respondents' motion did not even allege Respondents would be "prejudiced" or "surprised" if the eight

witnesses called by Muegler be allowed to testify or if the fifty-one (51) documents offered by Muegler be received into evidence. There was no evidence suggesting any "prejudice" or "surprise".

During Trial #1 Muegler was allowed to use Concepts Prospectus (Plaintiffs Exhibit 13) during cross-examination of Respondents to show the absence of the "representation", "reasonable reliance" and "damage" essential elements of their fraud claim. The jury returned a verdict for Muegler in large measure due this cross-examination. In Trial #2 (January, 1996), although both parties identified Plaintiff's Exhibit 13 (marked also Defendant's Exhibit A) as a document that may be introduced into evidence at trial, Respondent's elected not to offer Plaintiff's Exhibit 13 into evidence. A "ripped out" portion of Plaintiff's Exhibit 13 was offered by Respondents and was received into evidence (Plaintiff's Exhibit 8) over Muegler's Federal Rules of Evidence Rule 106 "incomplete document" objection (T1:98-100). During cross-examination Muegler offered the complete Plaintiff Exhibit 13 into evidence under Federal Rules of Evidence Rule 106. The district court denied admission of Plaintiff's Exhibit 13 into evidence and denied Muegler opportunity to use Plaintiff's Exhibit 13 during cross-examination of Respondents on the ground Muegler was precluded from using any document (even though listed in Pre-Trial submission by Respondents as a "may introduce" exhibit) at trial unless Respondents offered the document into evidence in their Case-In-Chief (T2:65-66; T1:99).

The May 23, 1997 Eighth Circuit Judgment (Appendix, infra A-1) is premised upon materially erroneous conclusions, to wit:

1. "During discovery, Muegler failed to produce requested pre-trial documentary evidence, to answer interrogatories, or to identify witnesses. He ignored orders of the district court to compel, and asserted his

fifth amendment at his deposition. Plaintiff's were therefore unable to discover his evidence. As a sanction for noncompliance, the court prevented him from presenting any evidence he had not turned over during discovery and from testifying. Shortly before trial, Muegler indicated that documentary evidence would be made available for review and that he would waive his fifth amendment privilege. The district court found that Muegler's offer of discovery had occurred too late in the course of trial preparation and that permitting undiscovered evidence at trial would prejudice the plaintiffs". Appendix, A-3.

2. "A careful review of the record reveals an almost complete failure to give discovery on the part of Muegler." Appendix, A-3.

3. "He (Sic: Muegler) claimed that he did not have necessary information to comply with discovery requests because the documents and files had been seized in the police raid and were in possession of Illinois prosecutors who were pursuing criminal charges against Grice and him. The docket sheet from the Illinois case indicates, however, that the state had complied with Muegler's discovery request for those documents almost two years before he admitted they were available and before he supplemented his answers to interrogatories." Appendix, A-3, 4.

These Eighth Circuit's conclusions are not supported by, and in fact are refuted by, the record on appeal. A careful review of Brief of Appellant Point V (pages 42-45) and Reply Brief of Appellant (pages 21-24), and the record on appeal cited therein, shows (a) Muegler did not fail to timely disclose any discoverable matter in relation to Trial #2, (b) Muegler voluntarily disclosed all the requested information and more by voluntary

[not then required in the district court] Federal Rules of Civil Procedure Rule 26(a)(1) disclosures, supplemental interrogatory responses, production of documents and pre-trial submission in March, 1994 [more than 21 months prior to Trial #2], (c) Trial #2 preclusion order was materially more comprehensive in scope than the information requested in Respondents discovery requests and (d) the district court never made a finding of "prejudice" or "surprise" to Respondents should Muegler be allowed to testify, offer witness testimony as disclosed or offer documentary evidence as disclosed at either Trial #1 or Trial #2.

The undisputed record on appeal shows the following. On December 29, 1989, 27 law enforcement officials raided Concepts offices and seized all of Muegler's Concepts documents pursuant to a search warrant (App:504). The documents seized included the documents plaintiff subsequently requested to be identified/produced in discovery November 26, 1990 (App:506). These document were not then within Muegler's possession or control (App:505). Muegler was indicted by the Washington County, Illinois, Grand Jury in February, 1992 (Bening's Supp. Appendix 30). On March 9, 1992 Muegler filed a Motion For Discovery (Bening's Supp. Appendix 30). When The State refused to comply, Muegler filed a Motion To Compel Discovery June 5, 1992 (Bening's Supp. Appendix 30). The State filed its first response to Muegler's Motion For Discovery (documents and list of witnesses) June 18, 1992 (Bening's Supp. Appendix 30) before the scheduled August 19, 1992 hearing on Muegler's Motion To Compel (7/22/92 entry at Bening's Supp. Appendix 30). That's where Eighth Circuit Judgment stops to support its conclusion "The docket sheet from the Illinois case indicates, however, that the state had complied with Muegler's discovery request for those documents almost two years before he admitted they were available and before he supplemented his answers to interrogatories." The problem is ... the Eighth Circuit panel did not look at the rest of the Clerk's Docket Sheet or Reply

Brief of Appellant (pages 21-24). The State did not produce the documents requested. Discovery was delayed because an interlocutory appeal was taken and was not finalized until January 23, 1993 (Bening's Supp. Appendix 31). Then, the trial judge was disqualified and a new judge was assigned to the case January 14, 1994 (Bening's Supp. Appendix 31). Discovery then resumed. Muegler's previously filed Motion To Compel was set for hearing March 18, 1994 (Bening's Supp. Appendix 31). The Clerk's Docket Sheet shows 3/1/94 "Answer To State's Motion For Discovery Filed" and 7/22/94 "Suppl Answer to def's (Sic: Muegler's) mot. for discovery filed"(Bening's Supp. Appendix 31). It was during this March 1, 1994 - July 22, 1994 period of time, and specifically on March 18, 1994, that The State produced the documents taken in the raid which were then disclosed to plaintiff in this litigation on March 23, 1994 (App: 503-505). Muegler's disclosure to plaintiff was timely made as follows: Supplemental Response To Production Request on March 23, 1994 (App:491), Supplemental Response To Interrogatories on March 23, 1994 (App:518) and voluntary Federal Rules of Civil Procedure Rule 26(a)(1) Disclosure Statement on March 23, 1994 (App:424). The true facts, then, based upon the record on appeal, shows Muegler timely disclosed all the information requested in Respondents interrogatories and production requests. There was no contrary evidence either before the trial court or the Eighth Circuit.

Prior to Trial #1, on March 25, 1994 Muegler filed a Pre-Trial submission disclosing Muegler and each of the eight persons called as a witness by Muegler and each of the 51 documents offered in Muegler's Case-In-Chief at Trial #2 (App:434). Respondents, also on March 23, 1994, filed their Pre-Trial submission listing Muegler and the eight persons called as a witness by Muegler at Trial #2 as persons Respondents "May Call" as witnesses at trial ... Respondents also listed 32 of the 51 documents offered by Muegler as exhibits Respondents "May Offer" at trial (App:453).

Prior to Trial #2, on December 15, 1995 Muegler filed a Pre-Trial submission disclosing Muegler and each of the eight persons called as a witness by Muegler and each of the 51 documents offered in Muegler's Case-In-Chief at Trial #2 (App:389). Respondents, also on December 15, 1995 filed their Pre-Trial submission listing Muegler and the eight persons called as a witness by Muegler at Trial #2 as persons Respondents "May Call" as witnesses at trial ... Respondents also listed 37 of the 51 documents offered by Muegler as exhibits Respondents "May Offer" at trial (App:408).

The district court's complete bar of Muegler offering any evidence at Trial #2 was more comprehensive than the scope of information sought in Respondents discovery requests, to wit: Respondents interrogatories, production requests and deposition questions propounded to Muegler June 3, 1994 did not request (a) Muegler's travel records which showed he was in Arizona during the period of time Respondents testified Muegler was making face-to-face false representations to them in Missouri/Illinois [Muegler's Exhibits N-3, A-4, B-4 and C-4], (b) Muegler's attorney-client billings to Concepts which showed Muegler was first employed by Grice/Concepts in July, 1988 and it was impossible for Muegler to have made the false representations to Respondents complained of in April-May 1988 [Muegler's Exhibits N-3, O-3, P-3, Q-3, R-3 and S-3] and (c) Respondents never requested the identification of witnesses in their discovery requests.

Respondents neither alleged in their Motion To Strike (App:318) or offered any evidence in support thereof showing they would be "prejudiced" or "surprised" at Trial #2 should Muegler be allowed to testify, should Muegler be allowed to have testimony from the eight persons called as witnesses or should Muegler be allowed use, as evidence and for impeachment purposes, the 51 exhibits offered by Muegler at Trial #2. The district court's January 4, 1996 total preclusion order

(App:20) did not make a finding of "prejudice" or "surprise" to Respondents should Muegler be allowed to testify and offer evidence at trial.

The effect of these preclusion orders was to deny Petitioner fundamental Rights in Trial #2 secured to him under The United States Constitution, including (a) the denial of Petitioner's Fifth Amendment Right against self-incrimination by imposing upon Petitioner a too costly penalty for assertion of the Privilege, (b) the denial of Petitioner's Right of Fifth Amendment Due Process, (c) denial of Petitioner's Seventh Amendment Right to a fair jury trial and (d) by de facto imposition of an excessive fine and punishment in violation of the Eighth Amendment. The Eighth Circuit Judgment, sought to be reviewed herein by certiorari, does not even address these important, fundamental issues raised consistently by Petitioner in the district court and on appeal. The constitutional questions presented in this proceeding have been preserved for appellate review.

ARGUMENT AND REASONS FOR GRANTING WRIT OF CERTIORARI

I.

Reasons For Granting Writ Of Certiorari

This Petition For Writ of Certiorari should be granted for three distinct reasons:

1. The question of when, and by what judicial test standard, evidence preclusion at trial is a "too costly" sanction penalty for assertion of Fifth Amendment privilege, has not been, but should be, settled by The Court. This case involves the fundamental question of whether a total bar of presenting any evidence at trial, without a showing of undue prejudice to the opposing litigant if the evidence be received after timely waiver of the privilege, is a too costly penalty for proper assertion of a civil litigant's Fifth Amendment privilege against self-incrimination during discovery. This issue involves serious Fifth Amendment Privilege, Fifth Amendment Due Process, Seventh Amendment Fair Trial and Eighth Amendment Excessive Fines and Punishment issues. The Court, in *Spevack v. Klein*, 385 U.S. 511, 515 (1967) cautioned that the Constitution limits "the imposition of any sanction which makes assertion of the Fifth Amendment privilege`costly' ". Eighth Circuit Judgment is in direct conflict with The Court's general rationale in the *Spevack* decision because the Eight Circuit made no attempt whatsoever to consider whether the district court's total preclusion of evidence order was a "too costly" penalty for proper invocation of the Fifth Amendment privilege against self-incrimination. The fundamental Constitutional principles involved in the fact pattern of this case are recurring and are of

significant importance to the Bench, Bar and Public. The issue also has generated considerable interest in the academic community. See., e.g., Frances S. Fendler, *Waive The Fifth Or Lose The Case : Total Preclusion Orders And The Civil Defendant's Dilemma*, 39 Syracuse L.Rev. 1161 (1988); Elkan Abramowitz & Jed S. Rakoff, *The Fifth Amendment Privilege In Civil Litigation : Assertion, Waiver, And Consequences*, Crim.L. & Urban Probs., White Collar Crim.Prac. 1985 (PLI Litig. & Admin. Practice Course Handbook Series No. C4-4169, 1985); Robert Heidt, *The Conjuror's Circle - The Fifth Amendment Privilege In Civil Litigation*, 91 Yale L.J. 1062 (1982).

2. Eighth Circuit Judgment directly conflicts with decisions from all the other federal appellate court circuits reporting cases on the subject matter involved in this case. See, e.g., *Securities And Exchange Commission v. Graystone Nash, Inc.*, 25 F.3rd 187 (3rd Cir. 1994) ("A trial court must carefully balance the interests of the party claiming protection against self-incrimination and the adversary's entitlement to equitable treatment" *Id.* at 192, "Because the privilege is constitutionally based, the detriment to the party asserting it should be no more than is necessary to prevent unfair and unnecessary prejudice to the other side" *Id.* at 192 and "... complete bar to presenting any evidence, from any source, that would in all practical effect amount to the entry of an adverse judgment, would be an inappropriate sanction", Id. at 191); *United States v. Certain Real Property And Premises Known As: 4003-4005 5th Ave., Brooklyn, NY*, 55 F.3rd 78 (2nd Cir. 1995)("Because courts must take care not to punish valid invocations of the privilege against self-incrimination and must try to accommodate those who would properly seek to claim the privilege, a prior assertion

of the Fifth Amendment does not preclude a litigant's later attempt to submit evidence", *Id.* at 80); *Wehling v. Columbia Broadcasting System*, 608 F.2d 1084, 1088 (5th Cir. 1979)("a court should measure the relative weights of the parties' competing interests with a view toward accommodating those interests, if possible); *United States v. United States Currency*, 626 F.2d 11, 15 (6th Cir. 1980)(accommodate both the constitutional privilege against self-incrimination as well as the legislative intent behind the forfeiture provision). The Eighth Circuit Judgment adopts the district court's erroneous determination that a litigant is permanently and totally barred from offering any evidence at trial if the litigant asserted his Fifth Amendment privilege during discovery even where (a) the adverse litigant suffered no undue prejudice from the privilege claim, (b) the privilege was timely waived prior to trial and (c) the order of preclusion bars evidence not sought in discovery by the adverse party. Eighth Circuit Judgment is in direct conflict with the "balancing of interests" rule applied in other circuits.

3. For the reasons and on the grounds stated in Reasons For Granting Writ of Certiorari 1 and 2, supra, and for the further reason that Eighth Circuit Judgment failed to consider these constitutional issues raised throughout the proceedings in the district court and on appeal, Eighth Circuit Judgment so far departed from the accepted and usual course of judicial proceedings, and sanctioned such a departure by the district court in this case, as to call for an exercise of this Court's supervisory power.

II.

Argument

(A) General Principles :

Fifth Amendment protections are available during discovery in a civil case. *Lefkowitz v. Turley*, 414 U.S. 70 (1973); 8, Wright & Miller, *Federal Practice And Procedure*, §2018 (2nd. ed. 1994).

In the seminal case, *Spevack v. Klein*, 385 U.S. 511, 515 (1967), The Court cautioned that the Constitution limits "the imposition of any sanction which makes assertion of the Fifth Amendment privilege`costly' ". *Spevack* involved a lawyer disbarment proceeding where the lawyer refused to testify at the judicial inquiry by asserting the Fifth Amendment privilege on the ground his testimony might tend to incriminate him. The case came to The Court from a state court determination holding the Fifth Amendment privilege was not available to a lawyer in a disbarment proceeding. This Court reversed holding the penalty of disbarment was a too costly penalty for assertion of the Fifth Amendment privilege against self-incrimination.

Since *Spevack*, The Court (a) struck down a state statute that required an officer of a political party to either waive the Fifth Amendment or forfeit his office because the statute required an unconstitutional too costly coercive choice between his right to participate in political associations and the privilege against self-incrimination [*Lefkowitz v. Cunningham*, 431 U.S. 801 (1977)] and (b) held that individuals could not be forced to waive their rights against self-incrimination by threats that their employment would be forfeited by assertion of Fifth Amendment Rights [*Garrity v. New Jersey*, 385 U.S. 493 (1967) and *Lefkowitz v. Turley*, supra].

The Court has yet to settle the issue respecting the judicial test or standard to be applied for determining whether a federal

district court evidence preclusion sanction penalty is "too costly" under *Spevack* in the context of a case where a civil defendant asserts his Fifth Amendment privilege against self-incrimination during discovery. Numerous federal appellate circuits have adopted a "balancing of interests" test, but, The Court has not yet spoken on the subject. See, *Securities And Exchange Commission v. Graystone Nash, Inc.*,, supra; *United States v. Certain Real Property And Premises Known As: 4003-4005 5th Ave., Brooklyn, NY*, supra; *Wehling v. Columbia Broadcasting System*, supra; and, *United States v. United States Currency*, supra.

(B) Facts of This Case Present Unique Opportunity For Court To Speak On Subject :

The facts of this case present a unique opportunity for The Court to resolve the various fundamental constitutional issues and sub-issues involved in this proceeding. The facts of this case show : (a) Petitioner in good faith asserted the Fifth Amendment privilege against self-incrimination on June 3, 1992 during a discovery deposition, (b) Petitioner first waived the privilege April 5, 1994 via a formal waiver affidavit, (c) the district court, after remand of Trial #1 judgment, was presented with, and failed to take advantage of, an opportunity to fashion a discovery remedy which would fairly accommodate both Petitioner's Fifth Amendment self-incrimination privilege rights and Respondents right to not be "surprised" or "unduly prejudiced" by Petitioner's evidence at Trial #2, (d) Respondents in fact would not have been prejudiced if Petitioner was allowed to testify and offer evidence from the witnesses and documents identified in the pre-trial submissions because Respondents discovered such evidence from Petitioner and other sources at least by March 23, 1994, (e) the district court totally precluded Petitioner from offering any evidence at trial, (f) the district court's preclusion order was more comprehensive in scope than the information sought by Respondents from Petitioner in discovery, (g) the district court's preclusion order amounted to the denial of a trial

by jury and was tantamount to entry of a judgment in favor of Respondents and against Petitioner and (h) the district court obviously based its rulings upon the erroneous conclusion that a litigant is permanently and totally barred from offering any evidence at trial if the litigant asserted his Fifth Amendment privilege during discovery.

These facts would allow The Court to adopt a judicial standard to settle the following issues of general importance respecting the total preclusion of testimony from Petitioner at Trial #2 on any subject. Was the preclusion order a "too costly" unconstitutional penalty for assertion of his Fifth Amendment privilege against self-incrimination during the June 3, 1992 deposition ? Was Petitioner thereby denied Fifth Amendment Due Process ? Denied his Seventh Amendment Right to a fair trial by jury ? Or, did the preclusion order constitute a prohibited Eighth Amendment excessive fine ? The Court could also revisit *Societe Internationale Pour Participations Industrielles et Commerciales S.A. v. Rogers*, 357 U.S. 197 (1958) which held a federal court's power to sanction a party for alleged failure to comply with discovery rules derives exclusively from Federal Rules Of Civil Procedure Rule 37. And, settle the issue concerning whether a properly invoked Fifth Amendment privilege against self incrimination claim to deny a civil litigant opponent discovery is outside the ambit of Federal Rules of Civil Procedure Rule 37 sanctions because the matter sought to be discovered is "privileged" and beyond the scope of discovery under Federal Rules of Civil Procedure Rule 26(a) and Federal Rules of Civil Procedure Rule 26(e)(1). See, *Securities And Exchange Commission v. Graystone Nash, Inc.*,, supra at 191.

Similarly, the facts presented would allow The Court to adopt a judicial standard to settle the same issues of general importance respecting the total preclusion of all of Petitioner's evidence (witness testimony and documentary evidence) at Trial #2 on any subject. And, if The Court so elects, to identify a judicial

standard which distinguishes between the judicial test applicable to (a) preclusion of testimony from a party claiming the Fifth Amendment privilege not to disclose evidence and (b) preclusion of testimony from non-party witnesses and documentary evidence either unknown (i.e. "surprise" and prejudicial evidence) and/or known (i.e. no surprise or prejudice to opposing party) to the opposing party from sources other than the party asserting the privilege.

(C) Eighth Circuit Judgment - Preclusion of Petitioner's Testimony Unconstitutional :

No matter how you cut it, Eighth Court Judgment is dead wrong and in conflict with *Spevack* and the Second Circuit, Third Circuit, Fifth Circuit and Sixth Circuit decisions identified above respecting the total preclusion of Petitioner's testimony at trial. Clearly, preclusion was not justified as a Federal Rule of Civil Procedure Rule 37 sanction because the withheld information was properly claimed to be "privileged" under the Fifth Amendment during the June 3, 1992 deposition and "privileged" information is beyond the scope of discovery under Federal Rules of Civil Procedure Rule 26(a) and not subject to Federal Rules of Civil Procedure Rule 37 sanctions. *Securities And Exchange Commission v. Graystone Nash, Inc.,*, supra at 191.

Total preclusion of testimony from Petitioner at Trial #2 cannot be justified on any theory because (a) the facts show Respondents would have suffered no "surprise" or undue prejudice by Petitioner's testimony, (b) the discovery sought by Respondents and allegedly denied by Petitioner was more limited in scope than total preclusion of Petitioner's testimony on any subject at Trail #2, (c) Petitioner waived the Fifth Amendment privilege on April 5, 1994 and unsuccessfully tried to have the district court fashion a remedy circa November-December, 1995 to allow Respondents further discovery from Petitioner and (d) the district court forced the case out to Trial #2 without any

attempt whatsoever to fashion a remedy which would have fairly accommodated both Petitioner's Fifth Amendment self-incrimination privilege rights and Respondents right to not be "surprised" or "unduly prejudiced" by Petitioner's evidence at Trial #2. Total preclusion of Petitioner's trial testimony was an unconstitutional "too costly" penalty for asserting the Fifth Amendment privilege during the June 3, 1992 deposition. *Spevack v. Klein*, supra; *Securities And Exchange Commission v. Graystone Nash, Inc.*,, supra; *United States v. Certain Real Property And Premises Known As: 4003-4005 5th Ave., Brooklyn, NY*, supra; *Wehling v. Columbia Broadcasting System*, supra; and, *United States v. United States Currency*, supra.

The district court exacerbated the prejudicial effect of the Constitutional violation by allowing, over Petitioner's objection, Respondent's legal counsel to argue in Closing Argument at Trial #2 :

- "Then, why did he (Sic: Muegler) take the 5th Amendment in his deposition ? He refused to answer the question. The 5th Amendment says I don't want to testify because I'll incriminate myself and get arrested. That's what the 5th — what does taking the 5th Amendment tell you ? One, he has got something to hide; and, two, he is afraid of being arrested just like Grice; and, three what kind of gall does he have to stand before you and tell you we don't have enough evidence to prove our case if he doesn't have the courage to sit down in a deposition and answer the questions truthfully ?" (T4:30)

- And, after reminding the jury Muegler took the Fifth Amendment and Concepts president Grice was "hauled away in handcuffs" after the "Feds had kicked down the door" (T4:23), Respondents' legal counsel argued "He (Sic: Muegler) didn't want the Feds knocking on

> his door. Why do you think he went to Arizona ? He's running from the law." (T4:23). There was no evidence to support these outrageous accusations.

Under limited circumstances an adverse inference may be drawn by the jury without violation of Constitutional protections when a party voluntarily refuses to testify at trial on a Fifth Amendment privilege claim. *Baxter v. Palmigiano*, 425 U.S. 308 (1976). But, that rule was not applicable here because *Petitioner wanted to testify at trial* and was denied opportunity to do so by the preclusion order. Therefore, the 1956 admonition of this Court was unfortunately experienced by Petitioner ... "The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as the equivalent either to confession of guilt or a conclusive presumption of perjury", *Slochower v. Board of Higher Education*, 350 U.S. 551, 557 (1956).

For these reasons Petitioner's Fifth Amendment privilege assertion was rendered unconstitutionally too costly, Petitioner's Fifth Amendment Due Process Rights were violated, Petitioner was denied his Seventh Amendment Right to a fair trial by jury and Petitioner was caused to suffer an excessive fine in violation of the Eighth Amendment by the district court order totally precluding Petitioner from testifying on any subject at trial and the Eighth Circuit Judgment affirming the district court's actions.

On certiorari, this Court should adopt a balancing of interest test similar to the test set out in *Securities And Exchange Commission v. Graystone Nash, Inc.*,, supra.

(D) Eighth Circuit Judgment - Preclusion of All of Petitioner's Trial Evidence Unconstitutional :

"To dismiss a party's action, or to grant an adverse judgment, or to foreclose him or her entirely from litigating an issue

properly in the case, merely for claiming the constitutional privilege (Sic: Fifth Amendment) certainly makes the resort to the privilege `too costly'. It is difficult to believe that sanctions of this kind can be defended." 8, Wright & Miller, *Federal Practice And Procedure*, §2018, p. 286 (2nd ed. 1994). "It may be seen, therefore, that dismissal of an action or entry of judgment as a sanction for a valid invocation of the privilege during discovery is improper. (citations omitted). In like vein, a complete bar to presenting any evidence, from any source, that would in all practical effect amount to entry of an adverse judgment, would be an inappropriate sanction (Sic: too costly)". *Securities And Exchange Commission v. Greystone Nash, Inc.*, supra at 191.

Here, the "prejudice" and "surprise" threshold prerequisites to any evidence excluding sanction, were not present or even alleged by Respondents. The sanctions imposed effectively denied Muegler his right to be afforded reasonable opportunity to fully litigate all contested issues in the case with relevant evidence. *Martindale v. International Telephone & Telegraph*, 594 F.2d 291, 295 (2nd Cir. 1979). Fifth Amendment Due Process includes the fundamental right to fully litigate trial issues, to be afforded fair opportunity to defend against the claims made and to utilize relevant evidence in the proceeding. The district court's total preclusion order effectively denied Petitioner Fifth Amendment Due Process and his Seventh Amendment Right to a fair jury trial in Trial #2 via the imposition of a prohibited excessive fine under the Eighth Amendment.

The district court and Eighth Circuit Judgment unconstitutionally judicially rewrote the terms of Federal Rules of Civil Procedure Rule 37 to [a] include non-disclosure of "privileged" matter [Sic: Fifth Amendment self-incrimination information] as being within the scope of a Rule 37(c)(1) sanction although the terms of Rule 37(c)(1) specifically provide otherwise, [b] to exclude the "harmless" non-disclosure element of Rule 37(c)(1)

which precludes a Rule 37 sanction and [c] to include within the scope of a Rule 37 sanction information not requested to be disclosed under either Federal Rules of Civil Procedure Rule 26(a) or Federal Rules of Civil Procedure Rule 26(e)(1).

The record does not support the conclusion that Muegler failed "to disclose information required by Rule 26(a) or Rule 26(e)(1)" as mandated by Federal Rules of Civil Procedure Rule 37(c)(1) to impose sanctions upon Muegler. There was no allegation or evidence that any alleged non-disclosure was anything other than "harmless" because Respondents had all the information they sought in discovery either directly from Muegler or from other sources more than 21 months prior to trial in January, 1996 ... it is incredulous, under this record, to conclude, as Eighth Circuit Judgment concludes, Respondents were "prejudiced" in preparing their case for trial in January, 1996, or they would be unduly "surprised" at trial if Muegler was allowed to offer evidence.

There was no legal justification whatsoever for the district court's order precluding Petitioner from offering any evidence at Trial #2. Certiorari should be granted because Eighth Circuit Judgment so far departed from the accepted and usual course of judicial proceedings, and sanctioned such a departure by the district court in this case, as to call for an exercise of this Court's supervisory power. The district court proceeding, affirmed by Eighth Circuit Judgment, had the markings of a Star Chamber proceeding.

CONCLUSION

Writ of Certiorari should issue to review the May 23, 1997 judgment of The United States Court of Appeals For The Eighth Circuit which is reported at 113 F.3rd 909 (8th Cir. 1997).

Respectfully submitted,

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Petitioner Pro Se and
A Member of The Bar

APPENDIX INDEX

Appendix A

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-2572

Alfred W. Harre,
Plaintiff/Appellee,

Bernice E. Harre,
Plaintiff,

David Bening,
Plaintiff/Appellee,

v.

Arthur G. Muegler,
Defendant/Appellant.

Appeal from the United States District Court
for the Eastern District of Missouri.

(PUBLISHED)

Submitted: April 17, 1997
Filed: May 23, 1997

Before BOWMAN, HANSEN, and MURPHY, Circuit Judges.

PER CURIAM.

In 1990, Alfred and Bernice Harre and David Bening sued Arthur Muegler, alleging claims of fraudulent and negligent misrepresentation. During a long discovery period, Muegler failed to provide requested documents, to respond to interrogatories, or to answer deposition questions, asserting his fifth amendment privilege. As a sanction for his noncompliance with discovery requests and orders, the district court[1] barred him from

[1] The Honorable Charles A. Shaw, United States District Judge for the Eastern District of Missouri.

presenting undisclosed evidence or testifying at trial. He nevertheless prevailed with the jury, but the judgment was overturned because of erroneous jury instructions. *See Bening v. Muegler,* 67 F.3d 691 (8th Cir. 1995). In the second trial, a jury awarded Bening and Alfred Harre $260,000 each for compensatory and punitive damages. Muegler appeals from the adverse judgment, contesting the sanctions imposed by the court, its evidentiary rulings, the jury instructions, and the sufficiency of the evidence. We affirm.

The evidence presented at trial is recited here in the light most favorable to the verdict. *Newhouse v. McCormick & Co.. Inc.,* 110 F.3d 635, 637 (8th Cir. 1997). Alfred Harre and Bening are Illinois farmers who invested in Concepts Communications and a related limited partnership in 1988 and 1989. James Grice, who was Concepts' president, and Muegler, who was Concepts' attorney throughout most of this period, had organized and conducted several promotional meetings that Harre and Bening attended. Muegler introduced Grice to the potential investors as a computer and communications expert, and Grice introduced Muegler as the former counsel of Emerson Electric Company. Muegler represented that the companies were involved in the telecommunications business and that money invested in them would be used to purchase telephone equipment and run the businesses. Harre and Bening each invested over $80,000, three fourths of it in a limited partnership which Muegler stated had a contract to provide beeper and pager service to the state of Illinois. There was no such contract, however, and the limited partnership never operated as a business. The funds invested by Harre and Bening were not used to purchase telephone equipment, and there was evidence that the $120,000 supposedly invested in the partnership was used instead to purchase a certificate of deposit to secure a $120,000 loan for Concepts. An amount almost equal to that loan amount was spent by Concepts to open a gay bar in St. Louis.

In December 1989, police raided Concepts' offices and arrested Grice, who as a convicted felon was prohibited from selling securities.[2] There was evidence that Muegler knew Grice was a convicted felon, and it was revealed after the raid that Concepts did not own its telephone equipment but was leasing it. The lessor took control, and Concepts was left without any assets. The Harres and Bening then sued Muegler, alleging that they had lost the total value of their investments because of Muegler's improper conduct.

During discovery, Muegler failed to produce requested pretrial documentary evidence, to answer interrogatories, or to identify his witnesses. He ignored orders of the district court to compel, and asserted the fifth amendment at his deposition. Plaintiffs were therefore unable to discover his evidence. As a sanction for noncompliance, the court prevented him from presenting any evidence he had not turned over during discovery and from testifying. Shortly before trial, Muegler indicated that documentary evidence would be made available for review and that he would waive his fifth amendment privilege. The district court found that Muegler's offer of discovery had occurred too late in the course of trial preparation and that permitting undiscovered evidence at trial would prejudice the plaintiffs. On appeal, Muegler argues that the district court should not have imposed those sanctions.

A careful review of the record reveals an almost complete failure to give discovery on the part of Muegler. Muegler disregarded court orders to answer interrogatories or produce documents, and he refused to answer any questions in his deposition other than to give his name. He claimed that he did not have necessary information to comply with discovery requests because documents and files had been seized in the police raid

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[2] Grice had been convicted in 1980 and 1981 of several counts of theft in Texas but was later paroled.

and were in the possession of Illinois prosecutors who were pursuing criminal charges against Grice and him.[3] The docket sheet from the Illinois criminal case indicates, however, that the state had complied with Muegler's discovery request for those documents almost two years before he admitted they were available and before he supplemented his answers to interrogatories. Only after the district court imposed sanctions and trial was soon to begin did Muegler indicate a willingness to produce the documents, identify his witnesses, and waive his fifth amendment privilege.

Although Muegler now claims the district court should be reversed, he still has not specified what particular evidence was excluded, its substance, or how he was prejudiced by its exclusion. *See Strong v. Mercantile Trust Co. N.A.*, 816 F.2d 429, 432 (8th Cir. 1987) (offer of proof is necessary for appellate court to determine whether exclusion of evidence was prejudicial). Under the unusual circumstances presented, the imposition of sanctions preventing Muegler from introducing undisclosed evidence was not an abuse of discretion and did not result in a constitutional violation. *Boardman v. National Med. Enters.*, 106 F.3d 840, 844 (8th Cir. 1997); *see also SEC v. Graystone Nash, Inc.*, 25 F.3d 187, 191-92 (3d Cir. 1994).

Muegler makes a number of other claims of error which he asserts individually and cumulatively resulted in constitutional violations and had an adverse effect on the jury. He argues that the district court abused its discretion in several evidentiary rulings and violated the Constitution by admitting irrelevant,

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[3] Both Grice and Muegler were indicted in Illinois on charges of the unlawful sale of securities and theft, and Grice was indicted on the additional offense of deceptive practice. In 1993, Grice was convicted of seven counts of the unlawful sale of securities, two counts of theft, and one count of the offense of deceptive practice, but the charges against Muegler were dismissed after the original verdict in this case. The Illinois criminal charges were reinstated after the judgment in his favor was reversed.

incompetent, and unduly prejudicial evidence while excluding other relevant evidence. He also argues there was not enough evidence to support the giving of several jury instructions, that they misstated the law and contained errors permitting the jury to return a verdict outside the law, and that the punitive damages instructions were unconstitutional. Finally, he contends that the plaintiffs did not state a claim of negligent misrepresentation in their complaint, establish their claims as a matter of law, or prove damages. Harre and Bening respond that there was overwhelming evidence to prove their claims and damages, the district court did not abuse its discretion in its evidentiary rulings, and the jury instructions properly stated the law.

After thoroughly examining the record and considering Muegler's arguments, we conclude that the claims of error are without merit. There was substantial admissible evidence to support the giving of all the jury instructions and the resulting verdict, and the district court did not abuse its discretion in its evidentiary rulings. The jury instructions taken as a whole adequately and fairly stated the law, and Muegler has not shown he was prejudiced by any error or that his constitutional rights were violated.

For these reasons, the judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-2572EMSL

Alfred W. Harre, et al.,
Appellees,

v.

Arthur G. Muegler,
Appellant.

Order Denying Petition for Rehearing
and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

July 9, 1997

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

CASE NUMBER: 4:90CV1798 CAS

ALFRED HARRE
Plaintiff(s),

v.

ARTHUR MUEGLER
Defendant(s).

JUDGMENT IN A CIVIL CASE

[Filed: January 23, 1996]

☒ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ **Directed Verdict.** This action came before the Court for a trial by jury, the Court having sustained defendant's motion for judgment as a matter of law at the close of plaintiffs' case.

☐ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that plaintiff David Bening recover of the defendant the sum of $130,000, with interest at the rate per annum allowable by law, and the costs of action.

Robert D. St. Vrain
CLERK

By: /s/ Craig Liddy
Craig Liddy, Deputy
DEPUTY CLERK

January 23, 1996
DATE

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

CASE NUMBER: 4:90CV1798 CAS

DAVID BENING
Plaintiff(s),

v.

ARTHUR MUEGLER
Defendant(s).

JUDGMENT IN A CIVIL CASE

[Filed: January 23, 1996]

☒ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ **Directed Verdict.** This action came before the Court for a trial by jury, the Court having sustained defendant's motion for judgment as a matter of law at the close of plaintiffs' case.

☐ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that plaintiff David Bening recover of the defendant the sum of $130,000, with interest at the rate per annum allowable by law, and the costs of action.

Robert D. St. Vrain
CLERK

By: /s/ Craig Liddy
Craig Liddy, Deputy
DEPUTY CLERK

January 23, 1996
DATE